

November 30, 2021

The Honorable Judge Bianco
U.S. District Court – EDNY
100 Federal Plaza
Central Islip, NY 11722

Re: Supplement to Kenner's October 5, 2021 18 U.S.C. § 3446(j) submission

Your Honor:

Considering the lack of movement on the docket for Kenner's October 2021 § 3446(j) submission – this submission supplements the record regarding:

(1) **Gonchar**—Hawaii loss after Northern Trust settlement testimony; and

(2) **Kaiser**—loss/victim issues: for Eufora and Hawaii.

Without a response from the government (as usual), it is clear that the government wants to avoid empirical evidence and facts as John Adams explained centuries ago...

President John Adams said: *"Facts are a stubborn thing; and whatever may be our wishes, our inclinations, or our dictates of our passions, they cannot alter the state of facts and evidence..."*

Nevertheless...

The government is stuck with theirs (specifically in absentia)...

(1) Gonchar...

Supplementing *ECF No. 1092 at 2* – “*section II. Items addressed: (1)Northern Trust settlements*”, Gonchar, like Peca, Berard, and Nolan) testified to his \$500,000-plus settlement with Northern Trust Bank (*Tr.4801-02*):

Q: Can you tell us what happened with the lines of credit that you opened up after speaking with Mr. Kenner.

A [Gonchar]: Sometime down the road I -- I mean, Kenner was making payments on the line of credit for sometime,¹ and then sometime down the road, a year, I don't remember exact time later, I find out that my money, I mean the line of credit, I mean the payments were not made and, you know, they took my money.

Q. And how much, when you say they took your money?

A [Gonchar]: Around a million dollars.

Q. Have you recovered any of that money?

A [Gonchar]: Yes. We reached a settlement agreement with Northern Trust Bank and I received some of that money.

Q. Approximately how much?...

A [Gonchar]: So it is just over 500 grand.

Gonchar's settlement amount far exceeds any traceable money from his Hawaii capital contributions to either: (1) the Jowdy loans or (2) the Constantine consulting payments: the only two allegations of criminality in the Hawaii project. Thus—Gonchar cannot be a victim of the alleged Hawaii fraud. Furthermore—Gonchar explained to the FBI in 2010 that he knew from Kenner and Jowdy— independently—that the Hawaii project loaned money to Jowdy (*ECF No. 959-21 at 8-9*).

For multiple reasons – Gonchar should be removed from any victim count, any loss calculation, and any restitution award.

(2) Kaiser...

Kaiser's submission is offered for further substantiation that John Kaiser, the government's star-witness, offered even more knowingly perjured testimony (*Napue* violations) regarding his potential loss or victim status thru known disinformation in the instant case: re—Eufora or Hawaii. In fact – Kaiser's

¹ Kenner was charged with making payments on the Northern Trust LOCs – just as Gonchar testified he expected. Kristen Peca (*Tr.709*), Michael Peca (*Tr.385*), and Berard (*Tr.3088-90*) testified to the identical expectations—thus Counts 7 & 8 that charged Kenner for making payments with his own personal capital were outrageous.

corresponding testimony confirms that he was desperate to cover-up his documented thefts from his friends & family—and pass the blame to Kenner (like Galioto was already orchestrating for Jowdy and his thefts of the Hawaii-loans, Mexico embezzlements, and other business dealings; including but not limited to Diamante Air, Murray loan, Kenner loan, Stumpel loan, Gaudet loan, etcetera [ironically debunked by the government themselves without recourse: [ECF No. 862-36](#); [ECF No. 862-1](#)]). Empirical records verify Kaiser was neither (a Eufora or Hawaii victim)—despite his suborned perjury: **the sole support for Kaiser confabulations of loss.**

Particularly including Kaiser, none of the exposed perjury/frauds by government witnesses would ever survive a new trial – because their empirically lacking integrity has been exposed (several included for specificity—*infra*).

Eufora: The government confirms Kaiser is not a Eufora victim...

[AUSA Komatireddy]: “*I also want to note with respect to the Eufora frauds Mr. Kaiser is not an alleged victim of the Eufora fraud.*” (Tr.1269)

That should have foreclosed the defense’s responsibility to disprove – as Constitutionally misinterpreted throughout the proceedings -- any Eufora allegations regarding Kaiser (especially the ones complicitly created with Galioto, *infra*).

Even under the *meritless* and *baseless* Kaiser loss theories, the Court has refused to ever address Kaiser’s obvious perjury of “*back pay*” and “*expenses*” (Tr.1413-14) as Kaiser’s outrageous explanation of the \$1,176,000 he received in August 2006 (documented in Rule 16 and stipulated banking records) to repay his friends & family’s \$1 million 2005 advance ([ECF No. 1036-22: GX-2103](#)) ([ECF No. 1036-23](#)). What requires action from the Court – even if just for loss/restitution issues previously raised – is that the empirical and exculpatory records exist, they are clear, but based on joint Kaiser/government rhetoric...they have been befogged from the Court (by design).

Kenner previous requests to have the government and Kaiser substantiate his explanation of the 2006, \$1 million-plus transfer to him is not unreasonable; considering its effects on guideline calculations—and sentencing issues.

If the complicit Kaiser-government representations were true (the proof would be simple to produce)...

- (1) Kaiser's fabricated \$195,000 "*back pay*" (*Tr.1413-14*) testimony would be easily verifiable (if actually real) with an *in camera* review of Kaiser's 2006 &/or 2007 IRS records (as previously requested)—and
- (2) A specific request for any back-up "*expenses*" records to substantiate Kaiser's testimony of \$600,000-**PLUS** of Hawaii "*expenses*" (*Ibid.*) couldn't be any simpler (if actually real); see *Wallach*.

Both are blatantly false as a blind man would see—and the Court must act.

"[D]etermining that a new trial was necessary, because lies of his key witness who '**tied all the pieces together**' even as to matters affecting only his credibility, could have caused the jury to reject his entire testimony and eliminate the foundation for conviction."; *United States v. Wallach*, 935 F.2d 445, 457-8 (2d Cir 1991).

Just another unchecked fraud in a long line of sanctioned injustices...

Collectively, the government and Kaiser cannot produce any reasonable "*expenses*" related to Hawaii. If they can – the government (and Court) should call Kenner's "*ridiculous*"² bluff (identical to their refusal to produce Peca's hidden "*anonymous*"..."*unsigned*" IRS whistleblower letter that Kristen Peca exposed to this Court as another part of government corruption of the facts; obviously effectuated to maintain control (thru disdain) of Defendant-Appellant for schemes *the government/Galioto manufactured* (including outrageously pronounced *dead pets, death threats, stalking, burned cars, etcetera*) (*10-5-2020, Sentencing H'rg Tr.26*), as:

[Kristen Peca]: "*And thankfully, that letter was found on Kenner's laptop to validate our suspicions and prove that he was harassing us and obstructing justice.*"

Bluntly – **none exist** (the IRS letter, Kaiser's "*back pay*", or "*expenses*")—the Court implicitly knows it—OR...the government should prove Kenner wrong (by Court order)—instead of just allowing a habitual liar (proven in Kaiser's Rule 16 texts: *ECF No. 1092 at 22*—et.al.) to sustain his criminal fraud on this Court (see 18 U.S.C. 1001).

These simple evidentiary requests would close these doors – with Kenner's requests airing on the side of justice and not Galioto/Jowdy's cabal fabrications. Noting:

² *10-5-2020, Sentencing H'rg Tr.81*

(1) Kaiser's egregious "*expenses*" amount is not a couple thousand dollars that Kaiser could substantiate was cash—and the Court clearly recognizes that. In contrast – Kaiser will not be able to produce **anything** of substance (via wire transfers, credit card expenses, or otherwise). These issues are gross disinformation – supported by a willing government and FBI agent (who had their instructions—and followed them by selling out their personal veracity).

(2) None of Kaiser's 10,000-plus texts (or emails) in evidence represent a single request for repayment of any of those *supposedly unpaid* Hawaii or California funds from 2005 thru 2013. That would be impossible considering Kaiser went to work for Jowdy (in 2011), 2-years before Kenner's arrest (in November 2013); a perfect inflection point to put Kenner on notice -- if being owed any Hawaii or California money, or if his Eufora stock transfer rhetoric was real (*Tr.1057-58*—et.al.). Instead – Kaiser repaid Kenner "*100k*" (*infra*) in summer 2011 (not the other way around)—and documented in Kaiser's own text admission to Kenner of a multitude of frauds on his friends & family (*ECF No. 1092 at 22*): non-repayment—impeaching his 2015 testimony (*Tr.980*).

(3) Nevertheless – Kaiser testified in August 2005 he "*didn't have the \$1 million*" for the Hawaii loan (*Tr.976*). The bank records consequently proved Kaiser perjured himself—again (*ECF No. 1036-20*), testifying he contributed "*approximately \$180,000*" to the 2005 transaction (*Tr.977*). Yet—disregarding that "*\$180,000*" perjury (*Id.*)—somehow the government and Kaiser want the Court to believe Kaiser contributed over \$600,000 of "*expenses*" from that point in time thru the August 2006 closing with Lehman Brothers. Not only is there zero proof (expected as the basis for a government criminal theory)—but it is illogical.

(4) Further overlooked by the Court is that Kaiser claimed he never received his Hermosa Beach "*\$3 million*" share (*Tr.1238*) (actually \$1,896,750)³ back from Kenner (testifying to "*approximately \$300,000*" received: *Tr.1042*). Starting in November 2007 (the Hermosa, California real estate closing), it

³ Kenner's Rule 33 (*ECF No. 416 – exhibit R33 B*: submitted on disc by counsel Pittell 11-28-2016) contained the accounting of Kaiser's full \$1,896,750 California repayments (and then overpayments as future loans to Kaiser once Kaiser was 100% repaid); **never the other way around**.

would have been the second multi-million scheme Kaiser was allegedly defrauded by Kenner within 12-months—*and did nothing*. Kaiser is a former NY cop. At this point in 2007-08 – Kaiser never contacted law enforcement for either of the massive fraud allegations he testified about a decade later in 2015 (under Jowdy's auspice – protecting both of their proverbial financial asnos). Instead and in direct contrast to someone who alleged he was defrauded for millions of dollars – without sending a single text (of the 10,000 in evidence between the parties: clearly, their primary communication medium), Kaiser decided – ***after those alleged thefts*** – to:

- (1) Introduce Privitello and his other friends to another Mexico investment in January 2008 (known as Frailes—after Kaiser's initial \$500,000 investment in December 2007 from his California proceeds—his first of two: [ECF No. 1036-34](#)—which Galioto learned Kaiser stole from his friends & family)—then
- (2) Kaiser personally invested in another Arizona real estate deal with Kenner in May 2008—then
- (3) Privitello and Kaiser's friends & family made December 2009 Eufora investments (based on Kenner—or a “25 grand...cabana party”?)

It doesn't jive.

In 2012 – when Kaiser and Berard were orchestrating the *record everybody* plan for Galioto (and working for Jowdy in Mexico), Kaiser never recorded Kenner with those multi-million dollar allegations – because he and Galioto knew Kenner would have laughed at Kaiser and his nonsense, *and it would have been recorded*.⁴

Re: Hawaii (in September 2005), Kaiser testified he “*probably asked for [his friends & family loan repayment after] about 32, 33, day 32 or day 33 I asked about it because I had everyone asking me about it.*”—and his “*family and friends were saying [in August 2005] when is the [Hawaii] money coming back for the 30 days*” (Tr.978).

⁴ This is commensurate to Gaarn recording Kenner for the FBI in 2012 for 5-hours, over 6-months, and never once alleging there was a strawman scheme to sell Kenner's shares (because they weren't per Eufora tax and corporate records since 2005). The strawman allegations would have been the perceived reason for recording Kenner for Galioto – if true in the first instance. Gaarn said nothing – because he knew Kenner would have laughed at the fabrications the government alleged at trial – thus he couldn't raise those issues *on a recorded line* (like Kaiser or Berard).

*If true...impossibly – no texts, emails, or otherwise exist about the millions of allegedly unpaid funds – or the fabricated story about selling his home to repay his friends & family—which temporally doesn’t jive either; defining “ridiculous[ness]” properly for the Court. The reality was that Kaiser independently chose to spend and re-invest his friends & family funds for himself when received (documented in his own stipulated banking records—and ignored to retain the illusion). Kaiser effectively was doubling-down on his investment bets (with his friends & family money). Years later (2011-2013) – after being sued for the money by Kenner and threats of litigation from his friends & family (ECF No. 785 at 10) Kaiser, like Jowdy, needed someone to blame. They employed *the enemy of your enemy is your friend*. Kaiser and Berard (under Kenner’s—and 5 interveners’ litigation pressures) decided to work with Jowdy and his attorneys.*

Critically: The government wants Kenner (ECF No. 1092 at 23-24) and Kaiser’s (*Id.* at 22) 2011 texts – of Kaiser’s full confessions and Kenner’s corroborating correspondence to Kaiser’s family -- hidden from this Court because they verify Kaiser’s non-repayment frauds on his friends & family and lies during trial testimony to this Court (Tr.980)—and his family’s widespread knowledge.

There cannot be a Hawaii loss of \$1,070,000—or anything...

In fact as another iteration of revisionary history – Kaiser testified that his unpaid \$1 million (from Hawaii) was converted into an “*investment*” for whatever money was unpaid after his August 2006 distributions (Tr. 1215: *infra*) – **thus, for a second reason, there cannot be a Hawaii loss.** According to his testimony -- Kaiser agreed to it and later worked for Jowdy for 5-years; supporting Jowdy, *the wunderkind, uber-developer*—and steward of Kaiser’s alleged \$150 million equity position (if true – but he nevertheless he testified it was—and subsequently documented it: ECF No. 1070-2).⁵

Q They changed meaning that you had a conversation with Mr. Kenner and you changed the terms of the loan?

A[Kaiser]: No. It was no longer a loan. It turned into an investment.

⁵ Frankly – this is a clear cut 18 U.S.C. 1001 violation – if the double-standard of law is removed.

So how was there a loss if it was an “*investment*” with allegedly 150 times collateral in 2006 – certainly not “*ruin[ing]*” anyone’s life (*Tr.1089, 5753*)? ⁶

Justice Sotomayor has previously opined on this exact issue positing, “If a victim chooses to hold collateral rather than reduce it to cash within a reasonable time, then the victim must bear the risk of any subsequent decline in the value of the collateral, because the defendant is not the proximate cause of that decline.” *United States v. Robers*, 134 S. Ct. 1854, 1860-1861, 188 L. Ed. 2d, at 891-892 (explaining that where a victim “does not intent to sell” collateral, “other provisions of the statute may come into play,” enabling a court “to count, as part of the restitution paid, the value of the collateral previously received but not sold”).

Kaiser's Eufora fabrication...

The stipulated banking records – and any court-ordered subpoenas, *supra*, would verify Kaiser's Eufora testimony about Kenner making an investment for him, was perjured. **Because** -- the banking records prove Kaiser was fully repaid; absent any Eufora transactions. The government knew any Kaiser testimony in this matter was un-supportable with empirical records – but they simply chose to allow Kaiser’s meandering testimony about \$275,000 he “*agree[d]*” (*Tr.1015*) to invest...*versus* not knowing about the phantom Eufora investment until after-the-fact...*versus* the blockbuster Eufora amount that “*totaled well in excess of another million dollars*” (*Tr.1248*: which Kaiser later testified he had invested in Eufora thru Kenner). ⁷

⁶ Ironically – Kaiser's “*investment*” documentation -- of Kenner Mexico equity collateral -- first reared its newfound claim in 2014 (8-years after they were alleged as signed) – with documents **obviously** fabricated along with Jowdy and his attorney, William Najam, during the 2014 Delaware lawsuit (*ECF No. 901-16; ECF No. 901-18*).

Note: After Kenner’s 11-2013 arrest and detainment -- the Hawaii-Mexico investors were still suing Jowdy for the unpaid loans the government droned that Kenner “*stole all of the Hawaii money and never gave it – the loan money -- to...uhhhh...Jowdy*” (Kristen Peca: *ECF No. 805 at 10,f.7*—et.al.). The government knew this was fabricated by Galioto after the 2011 Grand Jury testimonies of Peca, Sydor, and Stevenson – because Kristen Peca explained to Kenner later in her 2012 FBI – recordings about “*how mad Michael and the other guys are with Jowdy for not paying the loans back*” (Kristen Peca: *ECF No. 1092 at 4*—et.al.)

⁷ At a new trial – Kaiser’s temporally impossible testimony about his “*shopping list*” or “*grocery list*” that Kenner gave him (untrue), would also be exposed because he utilized it 6-days before he told Kenner he touched it (in Rule 16 evidence) – unless this Court would like to be part of that exposé fun; available upon request to uncover another complicit government/Galioto/Kaiser falsehood (a.k.a. *Napue*—or worse).

Note: after tracking all of Kaiser's testimony versus the stipulated banking records during trial, Kaiser's *belief* of what he was owed defies reality in any reasonable sense – irrefutably claiming he is owed **millions more** than the actual funds he was already repaid (as bank records confirm)—or even due in the first instance.

The government explained (*Tr.1269*) that “*Kaiser is not an alleged victim of the Eufora fraud*” -- because they knew the truth from day one, until desperation changed their needs. It was their ostrich-approach that influenced the Court’s confusion years later – founded in their post-trial morass. They chose to let it happen—and *went along with it* (akin to the Northern Trust settlement confusion and restitution; *7-30-2021, Restitution H'rg at Tr.12-19*). They failed their responsibilities to the Court under a near-century old Supreme Court opinion

“not that it shall win a case, but that justice shall be done”; See *Berger v. United States*, 295 U.S. 78, 55 S. Ct 629, 79 L. Ed 2d 1314 (1935)

Stunningly – the government let Kaiser testify (*Tr.1240-41*):

Q. In addition to the \$275,000 that we talked about, how much more money do you say was invested in Eufora through Mr. Kenner?

A[Kaiser]: I believe approximately another 1.7 million, something like that.

Q. You didn't testify to that on direct, did you?

MR. MISKIEWICZ: Objection.

THE COURT: Overruled. You can answer.

A[Kaiser]: I don't believe that was asked of me.

Q. This 1.7 million that you say Mr. Kenner invested for you came after the \$275,000; is that correct?

A[Kaiser]: Yes.

Uncle!! Further testimony may include Kenner's first-born child (or more).

Ironically – the government never sought Kenner's Eufora shares in forfeiture...because they knew it was all fabricated for trial – and would open

*arguments about their multiple mis-representations (Tr.5970, 5974), misleading Q&A (Tr.2732—et.al.), and FBI cover-up (criminally altered FBI 302(b) notes: 3500-TG-1-r at 2)*⁸...

The government and Court have overlooked that if the Gaarn shares were some part of a strawman fraud – with the government reiterating the refrain that Kenner was “*selling his shares*” (Tr.5974—et.al.) (the same ones that CEO Gentry and the Eufora accountants verified in Federal tax documents Kenner relinquished in 2005) – they would have forfeited them. Instead – just like the Eufora tax records verify – Gaarn (thru his Standard Ventures LLC: Tr.2570-71) still owns them (See *Kenner-trial Ex.80*: verifying “*May 04, 2009*” from Eufora CEO Gentry to Gaarn that “*Our records show that AFTER the completion of the transaction for William Ranford, Standard Ventures LLC will [own] 1.90% of Eufora LLC Stock/Units remaining*”. Note: Gaarn replied to the email, “*That is correct.*”

Gaarn verified to the FBI thru testimony that Kenner's transfer of Eufora stock to him (Standard Ventures LLC) occurred in 2005 during his “*1/11/12*” (in-person) FBI proffer to Galioto (raw notes). Without explanation, the FBI raw notes were **altered** after the meeting to **change** Gaarn's testimony that he received the Eufora shares from Kenner as part of a 2005 transaction – to a 2007 transaction; ironically again, not the late 2008 transaction they fabricated for trial (Tr.2493).

Q. Do you recall approximately when Mr. Kenner asked you to become a managing member of Eufora?

A [Gaarn]: It was around 2008-2009.

Q. You said 2008 and you trailed off. Did you say and 2009?

A [Gaarn]: 2009. It was around 2008, 2009.

Based on the misleading government proffers at trial and Gaarn's well-prepped testimony, inconsistent with his FBI proffer raw notes (of 3 years earlier: 2012—reminiscent of Kaiser and Ranford vehement denials of their FBI raw notes), the Court (ECF No. 501 at 26-27) identified of Gaarn's testimony: “*He also said that he signed a transfer of membership interest agreement in around 2008 that Kenner*

⁸ Oral arguments are welcomed on this specific FBI fraud on the Court – &/or Kenner will produce the Gaarn 302(b) note upon request of the Court.

backdated to indicate that it was signed on August 1, 2005" (Tr.2499-50; GX-TG-2)

This was FALSE – because, according to the raw notes from Galioto's meeting, Gaarn told the FBI that Eufora CEO Gentry gave Gaarn the documents to sign; *not Kenner*. Gaarn told the FBI on January 11, 2012 (*See 3500-TG-1-r*) that he took over the AZ Eufora Partners I Managing Member role in 2005—and signed the paperwork for Gentry (Eufora's CEO) in 2007 (not Kenner).

- The government has a lot to answer for by allowing these known misrepresentations at trial that Gaarn took over the deal from Kenner in "*2008*" (three [3] documented years after the fact), and considering "*2008*" was never mentioned in any of Gaarn's raw notes: ***even the re-fabricated ones*** (*3500-TG-1-r at 2*).

Tim Gaarn's credibility...

Additionally -- the Court should note that Tim Gaarn was *more likely than not* the most brilliant businessman in the courtroom during the entire 2015 trial; having a Wall Street sophistication and personal contacts that are second to very few Wall Street veterans – yet he testified to knowing *nothing about anything*; including his Eufora stock sales (*Tr.2628*) or the investigation and lawsuits he triggered with Rudi Giuliani's investigative and legal team (*ECF No. 892 at 23*) (*jumping the shark* that access to Giuliani's team was commonplace—specifically considering Gaarn's testimony was based in knowing *nothing about anything*...questioning what Gaarn would have told Giuliani's team to engage them in the first instance under that ignorance):

Q. Standard Ventures, your company, you remember selling your shares to the people that you're supposed to be representing?

A [Gaarn]: No.

Q. Have no recollection of that?

A [Gaarn]: No.

The Court should note that Eufora investors' attorney Stolper (who Gaarn hired: *ECF No. 892-23 at 6*) sent at least three (3) letters about the selling of Gaarn's shares *in real time*, later addressing Constantine's allegations of illegality as "*predictable*" (*ECF No. 713 at 51-52*) and without empirical records (as Kenner documented on the Home Depot recording and previously). Being accused by Constantine of

wrongdoing, Kenner documented all of it (specifically the Home Depot recording) for Eufora's attorney who **cc'd Gaarn**, and 29 other interested Eufora parties (See [ECF No. 892-23 at 9-18](#))—all absent Kenner or any *mens rea* of guilt. Stolper's exculpatory letters were buried in the government's late dump of Rule 16 evidence on the eve of trial ([ECF No. 901-38](#) [July 8, 2010 letter]; [Ex. 1](#) [July 15, 2010 letter]; [ECF No. 892-23](#) [July 16, 2010 letter]—et.al.)—Strategically obfuscating them from use at trial.

And – after testifying he was unaware of what a Managing-Member was ([Tr.2615-16](#)):

Q. And so the record is clear, at the time that you participated in the formation of the company, did you know what a managing member was?

A [Gaarn]: No.

Q. As a matter of fact when you signed this document, you weren't sure what a managing member was when Mr. Kenner asked you to become a managing member of Eufora, AZ Eufora Partners, correct?

A [Gaarn]: I don't recall if I knew at that point, no.

...Perhaps most egregiously – Gaarn testified he was unaware of what a K-1 tax document was ([Tr.2591](#)):

Q Now, are you familiar with a document, tax document known as a K-1, sir?

A [Gaarn]: I've heard of it, but I'm not sure what it is though.

Contrast that...when every other passive-equity investor identified specifically what a K-1 tax document is – and for what (i.e. -- [Tr.1355](#)); even Kaiser:

Q. What's a K-1?

A [Kaiser]: When you have an LLC that's your record of tax, so the K-1 you'll get annually.

It was just more mixed-testimony by another government witness under duress to obscure the documented and empirical truths.

Kaiser solicited Privitello (and the 3 others investors -- unknown to Kenner) – not Kenner...

Kaiser's testimony that *Kenner did it* was necessary to support the ***projecting*** of his own criminality onto Kenner.

For Hughes, Rizzi, and Ethel Kaiser ([*Tr.1059-61*](#))—Kenner was never mentioned:

Q Whose money are you transferring? Is that all yours or is there other people's money that you're transferring?

A [Kaiser]: No, none of this is mine. I'm just doing the transfer for my mom, whose name is Dolores Kaiser, and also Bob Rizzi, and another gentleman named TR Hughes.

Q Did you do that with their permission?

A [Kaiser]: Yes.

Q How did those people, your mother, Rizzi, Hughes, how did they find out about Eufora?

A [Kaiser]: I told them.

Q What did you tell them?

A [Kaiser]: I actually called them from Eufora offices, and I told them that this deal was going to be great, it was imminent, it was going to start within a month or two, and the payoff was going to being a great opportunity.

Q Who were you relying on to make those representations?

A [Kaiser]: I was relying on Tommy Constantine who was in the office while I was on the phone.

Q Was it this speakerphone?

A [Kaiser]: On speakerphone.

Q Do you know whether or not Mr. Constantine spoke?

A [Kaiser]: Yes, he did.

Q Who did he speak to this phone call?

A [Kaiser]: All three individuals.

Q You overheard what he said?

A [Kaiser]: Yes.

Q In sum and substance, what, if anything, did he say when he was on the speakerphone?

A [Kaiser]: It was a great opportunity, the only reason you're getting the opportunity was because of my relationship with Mr. Constantine, and he needed the funds ASAP.

Where is Kenner's involvement?

Answer: There was none.

For Privitello—he told you Kaiser led him to Constantine; again not *Kenner*; unless fake, “*25 grand*” (*Tr.1429*) cabana party that *does not exist* in Vegas makes you guilty in life and everything that follows. Privitello detailed about his choice to invest in Eufora (*Tr.1442*):

A [Privitello]: I stressed to John Kaiser about that I was stressing out about my wife going back to work and would love for her to stay home. After communicating back and forth with him, he [Kaiser] said I don't know if you ever heard of the company Eufora, I said sure, he said there might be a good opportunity, if you'd like I can put you in contact with Mr. Constantine.

Privitello continued exposing Kaiser's solicitation of him – alone (*Tr.1489*):

A [Privitello]: ...he [Kaiser] said you've heard the name thrown around in the past, it looks like there's an opportunity. You might want to talk to Tommy. John Kaiser was in Arizona and Tom -- he was with Tommy and called me up and Tommy told me more detail about Eufora.

Again, absent Kenner -- Privitello verified he and Kaiser discussed the final investment percentage directly with Constantine, directly (*Tr.1537*):

Q And that conversation that you had with Mr. Kaiser dealt with the amount of money that you would be investing as well as the percentage you would be getting; is that correct?

A [Privitello]: He [Kaiser] put me on the phone with Tommy and I think that is when we came up with the amount of percentage.

Amazingly –Kaiser's side deal theft of 0.5% from Privitello's 2% equity (for his \$200,000 investment – based on a \$10 million Eufora valuation; equaling the temporally identical 2009 Gonchar investment) was exposed during the trial. It was another Kaiser fraud on his friends & family that Galioto had to conceal to keep the finger pointed at Kenner and hide Kaiser's friends & family thefts – again – including Privitello this time.

Privitello explained his lack of knowledge to the Court of another Kaiser skimming fraud (while a needy government turned its well-worn blind-eye) (*Tr.1579*):

A [Privitello]: It was a deal that I had with Tommy Constantine, and John knew about it. What I was trying to say is, everybody knew -- Tommy knew I was putting up 200 and getting 1.5. John knew I was getting 1.5. So everybody knew what was out there. Now, if my 200 was really buying two percent and someone was getting a half somewhere that I didn't know about, I don't know about that.

Kaiser's desperation to repay all of his friends & family, **whom he stole from** (specifically including Kenner in the Arizona and Sag Harbor “*fraudulent transfer*” of title crimes (*ECF No. 901-43 at 12, ¶57*), *supra*—et.al.) led to Galioto's perfect and compliant star-witness (Kaiser); while fortifying his underlying instructions of protecting Jowdy from Kenner's relentless legal pursuits on behalf of the Hawaii-Mexico investor base of 19+ Plaintiffs. This protection specifically included documents Galioto withheld from *Brady* production; further concealing his cover-up of transparent Jowdy-loan knowledge in the first instance: *ECF No. 1006-1/ECF1006-2*).

As a result of the selective removal of exculpatory evidence, one can look to the Law journal: Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages*:

The Tale of *Brady v. Maryland*, 33 McGeorge L. Rev. 643, 651 (2002) (prosecutor would have to think:

“This piece of evidence is so exculpatory in nature that it actually undermines my belief that a guilty verdict would be worthy of confidence...once I turn this evidence over...I can assume my zealous efforts to obtain a guilty verdict that I have just concluded will not be worthy of confidence.”).

Conclusion...

Kaiser's testimony wanders – with government complicity – from the *ridiculous* to the *utter absurd*, re: Hawaii and Eufora transactions—none supported by empirical records.

When corroborated with the facts that Kaiser recovered and retained every dollar repayment from the Hawaii project (\$1,176,000)—and Kenner (\$1,896,750: in the 50-50 Hermosa project) as agreed (and documented), in lieu of paying his friends & family back, it is clear that Kaiser kept the money and reinvested it *for himself*—and became desperate like Jowdy to eliminate Kenner's litigation pressures on behalf of Kenner and Kenner investors. Kaiser's distress led him and Berard to Mexico in 2011, and an *agreement (enemy of my enemy...)* to join Jowdy's Racketeering cabal; and consciously remain in it -- until 2017 -- **after** Kaiser told the FBI “*in 2012*” about Jowdy's thefts. See Kaiser's exculpatory statement concealed by the government (a *Giglio* violation: *10-28-2020, post-sentencing H'rg Tr.47-50*).

In 2015 – Kaiser testified he was unaware of his boss' thefts (*Tr.1229*—et.al.) like a good boy⁹ – but blurted out post-sentencing in contradiction, about:

⁹ Kaiser was present during 2-days of Jowdy January 2010 California deposition—while Jowdy and his attorney confessed to Jowdy receiving and refusing to return any of the Hawaii loans (*ECF No. 862-36*) &/or the individual loans he received from Kenner, Murray, Norstrom, Stumpel, Gaudet and others (*ECF No. 902-13*—et.al.). Galioto received copies of Jowdy's deposition confessions in February 2010 from attorney Richards, Kenner, and Attorney Madia—and ignored Jowdy and his attorneys confessions (January 5, 2010—Jowdy California deposition at Tr.290):

Q. Do you know -- do you know where we can get an accurate accounting of the checks that were issued and how the money was spent?

A [Jowdy]: for what?

Q. For Baja Development Corp.

- (1) His full pretrial knowledge of Jowdy thefts of the loans (*10-28-2020, post-sentencing H'rg Tr.47-50*)—et.al., and
- (2) Impeaching himself—while debunking the government's opening **lynchpin** theory (*Tr.31*).

Kaiser's 2020 in court statements also corroborated his 2019 written submission about his *pretrial* knowledge of Jowdy's thefts from Kenner and Kenner investors—and conscience decision to remain in the Jowdy conspiracy with Berard (*ECF No. 628*).

(*10-28-2020, post-sentencing H'rg Tr.47-50*):

[Kaiser]: *"I went down there [Cabo, Mexico] in 2012 it wasn't long before I caught wind of how he [Jowdy] was doing this and – which was roughly 2013. I actually audioed, videotaped...and then I go to the government and say it's a crime what's going down there. He's stealing millions of dollars. I even had the accountant on tape, Antonio Marques, talking about the criminal activity. And I said if only the FBI knew what Danske and Ken Jowdy were doing..."*

Based on Kaiser's pretrial 2012 *Giglio* statement (and the government's concealment), the government clearly misled the Court on day one of the trial (during opening remarks: *Tr.31*) when positing as fact...

[AUSA Komatiredy]: *"This is the fraud where the defendants lie to the investors about who's stealing from them...The defendants tell the investors that a guy in Mexico named Ken Jowdy, stole their money and ran away with it"*

Galioto (and consequently the government) knew from Jowdy and his California attorney's confessions (since January 2010) that *Jowdy stole the money* and admitted

MS. CROWTHER [Jowdy's attorney]: Objection. Assumes facts that you're entitled to that.

MR. RICHARDS: Well, we wired him money.

MS. CROWTHER: So what? You gave him a loan. That doesn't entitle you to an accounting of how it was spent.

- This is the same Hawaii-loan Jowdy denied in the Arizona litigation (*ECF No. 1006-1 at 1*) – fortuitously dismissed with prejudice just 3 weeks before Jowdy and his attorney's brazen flaunting of the loans.

to it. But – why wouldn't he admit to it...he was protected by the best *above the law* and complicit counsel that stolen money could pay for?

The government's knowledge of Kaiser's exculpatory *Giglio* statement, prejudicing the proceedings at large, was ignored to maintain that Kenner “*stole all of the Hawaii money and never gave it – the loan money -- to...uhhhh...Jowdy*” (*ECF No. 805 at 10.f.7*—et.al.)—while juxtaposing their pretrial coercive statements as Q&A during trial about “*authorizations*” which frankly were granted by:

- (1) The Hawaii corporate By-Laws (*Kenner-trial-exh-217* intro'd at *Tr.4458, 4525; ECF 959-37*); and
- (2) The Northern Trust LOC Letters of Authorization (*ECF No. 902-3*).

No other authorizations were required—but the government's droning overwhelmed reality—again.

The prize for Kaiser (and Berard's) complicity was Galioto's oversight protectionism—while they stole (criminal acts) the Arizona and Sag Harbor real estate projects (*Tr.3047-49*: Berard's testimonial confession—ignored during previous restitution hearings: *7-30-2021, Restitution H'rg at Tr.8*); ironically totaling 10 times the alleged “*ill-gotten*” funds (of less than \$280,000: *10-5-2020, Sentencing H'rg Tr.79*) the Court was left to posit at sentencing (still under disagreement);¹⁰ the funds Kenner *recovered* during the 13-year timeframe of the superseding indictment's allegations as improper funds.

Ultimately...

(1) Kaiser's Hawaii testimony of converting whatever fabricated non-payment to a fabricated “*investment*” (*ECF No. 1070-2*) eliminates his victim status and the \$1,070,000 Hawaii loss amount; and

(2) Kaiser's Eufora testimony – of any amount he could fabricate at that moment, *supra* – highlights the lack of veracity between the government and Kaiser: allowing it to occur (a.k.a. a *Napue* violation).

¹⁰ The government actually documented Kenner's short-term loans to Constantine and Gaarn that were the basis for their respective loan repayments – effectively leaving Kenner still less than fully repaid (never ahead)—after Constantine and Gaarn's 2008-09 repayments.

Napue violations occur when the government knowingly permitted the introduction of false testimony—and reversal of verdict is “**virtually automatic.**” *United States v. Stofsky*, 527 F.2d 237, 243 (2d Cir 1975) (citing *Napue v. Illinois*, 360 U.S. 264, 269, 3 L. Ed. 2d 1217, 79 S. Ct. 1173 (1959)), *cert denied*, 429 U.S. 819, 97 S. Ct. 65, 50 L. Ed. 2d 80 (1976).

At a minimum at this time, the Court should act; eliminating Kaiser’s loss amounts and victim status in its entirety – whether or not is chooses to issue subpoenas (as requested—*supra*) to expose the obvious Galieto/Kaiser complicit lies—and government pretrial knowledge—which prejudiced the entire proceeding as the government’s star-witness; see *Wallach*, 935 F.2d at 457-8.

Respectfully submitted,

Phil Kenner, ProSe